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Matthew E. Malhiot

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Florida's Breath Alcohol Testing Program Violated Chapter 11D-8 F.A.C. Rule For 5 Years

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Back in March 2006, during the time that FDLE-ATP was transitioning from the Intoxilyzer 5000 to the Intoxilyzer 8000, Chapter 11D-8 F.A.C. was revised. A portion of this rule was in place, during the time the Intoxilyzer 5000 was in use and remained with the Intoxilyzer 8000. The portion of this rule stated that the machine **MUST** have a department inspection completed, upon being "*returned from an authorized repair facility*".

This mandatory, procedure demanded that a department inspection **MUST** be completed at the agency, so that any damage that may have occurred during the shipping of the Intoxilyzer 8000, back to the agency, could be detected during the department inspection. Keep in mind, that the required, department inspections were to be completed at the agency--NOT at FDLE. Therefore, the Department Inspectors, myself being one of them, were constantly traveling statewide



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failed to pass the inspections, upon being returned from CMI Inc., the manufacturer of the Intoxilyzer or another CMI authorized repair facility".

There were many times when a machine was returned from the CMI factory or again, another CMI authorized repair facility, back to an agency, JUST after having been repaired, that the machine would IMMEDIATELY fail to pass the department inspection. Again, the reasoning and intent that the required, department inspections were to be completed, at the individual law enforcement agency, was so that any problems that may have occurred, during the shipping process would be detected before placing the 8000 back into service. When an Intoxilyzer would fail to pass the department inspection (at the agency), it would then be shipped right back to CMI for yet another repair. It just so happens, that a machine can and does break, during shipping.

In 2010, FDLE-ATP came up with a cost effective plan to save FDLE and the local law enforcement agencies money. By requiring ALL Department Inspectors to relocate to Tallahassee, including myself. This would allow the Alcohol Testing Program to remain an "authorized repair facility" and allowing Department Inspectors to complete the necessary repairs, rather than the agencies doing agency inspections. The idea was to eliminate the "cost of labor" charged by CMI, plus the cost of the Department Inspector having to travel all over the state. This was potentially meant to save the taxpayers money as well, by having FDLE only pay for the parts needed for repairs and again, saving on the cost of labor that would be incurred when machines were sent to CMI.

The plan of action was put into place in 2010, and ALL Department Inspectors relocated to Tallahassee as was required. However, like many other important issues, surrounding FDLE's Alcohol Testing Program, this plan was never fully implemented and ALL repairs were still NOT being completed in Tallahassee.

During 2010, when these changes were being made, FDLE-ATP overlooked something of great importance by failing to revise Chapter 11D-8.004. The rule still required a department inspection to be completed, anytime a machine was returned from an "authorized repair facility" to an agency. Despite many recommendations, back in 2010, to make changes to Chapter 11D-8 F.A.C., this was never consummated. This means that between 2010 and July 29, 2015,



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from an "authorized repair facility".

During this year (2015), some Florida courts ruled that in fact, the department inspections needed to be completed at the agencies, after they were shipped by the repair facility to law enforcement agencies. These department inspections were to be completed, before a machine was allowed to be placed back into service for evidentiary use. It was only after the courts became involved, that FDLE-ATP dispatched a Department Inspector to EVERY law enforcement agency, in the Florida Panhandle, to begin completing department inspections, on every machine, located at each individual agency.

As the courts began ruling that department inspections must be completed at the agencies, FDLE-ATP found themselves in a predicament. To remedy the issue at hand, they decided they could either (1) Comply with their own rule or (2) Change their rule. Guess which one they chose? They decided to change the rule. By FDLE-ATP changing their rule on July 29, 2015, they no longer defined FDLE-ATP as an "authorized repair facility". This way when a machine was shipped back to an agency, it would no longer be required to complete a department inspection at the agencies, because FDLE was no longer an "authorized repair facility" due to their changing of the rule.

The current problem with this situation is that FDLE-ATP continues to do "repairs" on the Intoxilyzer 8000, even after changing the rule which now states they are no longer an "authorized repair facility". What they also did was change the wording in the rule from "repair" to "maintenance", so they are now trying to imply that "repairs" are "maintenance". Repairs versus maintenance, when dealing with the Intoxilyzers, are two distinctly, different processes and these differences are very important. This is nothing more than FDLE-ATP playing a word game, in order to do as they please, rather than acknowledging what the courts had ruled.

FDLE-ATP continues to take machines apart to make "repairs", such as replacing batteries, replacing breath tubes, replacing dry gas regulators; as well as other repairs. What FDLE-ATP is doing with the machine ARE "repairs", NOT simple, routine maintenance. For example, if a breath tube is broken and they have to replace it; that is a "repair" of the machine. When a breath tube is broken, the machine is NOT functional; therefore, a "repair" is required, in order for the machine to operate properly, allowing it to be placed back into service.



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needs cleaning; that would be considered "maintenance". Nothing was broken on the Intoxilyzer, and they were simply maintaining the machine. [Publish a post](#)

Consider this, you have the oil changed in your car, would it not be considered "maintenance"? On the other hand, if the alternator on your car went out, you would most certainly need it "repaired", in order for the car to function again.

If you read this article in its entirety, you will have noticed two, separate issues here, one existed prior to July 29, 2015, and a separate issue between 2010 and July 29, 2015.

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Written by **Matthew E. Malhiot**

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Curt Harrington PATENTAX.COM
Tax & Patent Practitioner at Harrington & Harrington

Great article. I have questions. What are the modes of failure (a) that occur during normal use that requires that the machine be sent in for repair; (b) what are the modes of failure that occur during shipping? For (a) and (b) what sorts of errors are vectored in which direction? For example, (a) might be a electromagnetic (light) source normal frequency shift by age that might cause an average .3 rise in BAC that may range from .1 to .5. Will anything in this rule create an un-doing/reversal (not on appeal as that time has passed) of old cases?

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Matthew E. Malhiot AUTHOR 2nd connection
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Leslie Sammis The second issue is as of July 29, 2015, FDLE is no longer an "authorized repair facility" under Chapter 11D-8; however, they are continuing to make "repairs" on the machines, when they should NOT be.

FDLE is trying to say that the "repairs" they are completing in Tallahassee are only "maintenance". They are playing a word game, by changing their rule, but there is clearly a difference in a "repair" versus simple "maintenance" and they know this. What they are doing is conducting "repairs", that according to Chapter 11D-8, they should not be doing. This is my opinion, as one who



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In this article, I refer to CMI, to include the factory in Kentucky, as well as CMI "Factory Authorized Repair Facility" This would include Enforcement Electronics, as they are a CMI "Factory Authorized Repair Facility". You may

know that Enforcement Electronics also does warranty work on the Intoxilyzers.

You may also be aware, but Enforcement Electronics had been completing repairs, well before the Intoxilyzer 8000 was even placed into service, in Florida.

The original plan back in 2010, when all Department Inspectors were required to relocate to Tallahassee, was to have FDLE complete ALL "repairs" and no longer use Enforcement Electronics or the CMI factory in Kentucky. However, FDLE's management "above" the Alcohol Testing Program at FDLE killed the idea.

Does this clarify and answer your questions?

Matt

Like Reply(1) 2 months ago



Leslie Sammis 2nd
Criminal Defense Attorney in Tampa, FL

Yes, thank you that is very helpful.

Like 2 months ago



Leslie Sammis 2nd
Criminal Defense Attorney in Tampa, FL

Good article. I always enjoy your articles and they are very well written.

So I have a couple of questions. First, I understand the issue that existed from 2010 to July 29, 2015, but what is the other mysterious separate issue that existed prior to July 29, 2015? It is late - so I'm missing something.

Second, you mention repairs at CMI but not at Enforcement Electronics Services, Inc., in Lakeland. When did Enforcement Electronics start doing the repairs and how did that fit into this cost savings plan? How did they decide whether to send the machine to CMI or Enforcement Electronics and how will that change with these new rules?

Like Reply 2 months ago

